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Nos. 86-219, 86-224, 86-225, 86-226

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUTHERN UNION CO., ET AL.,
Petitioner.

v.

JICARILLA APACHE TRIBE, ET AL.,
Respondents.

SOUTHLAND ROYALTY COMPANY
Petitioner,

v.

JICARILLA APACHE TRIBE AND DONALD P. HODEL, SECRETARY OF THE INTERIOR,
Respondents.

EXXON CORPORATION, *et al.*,
Petitioner,

v.

JICARILLA APACHE TRIBE, ET AL.,
Respondents.

UNICON PRODUCING CO.,
Petitioner,

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JICARILLA APACHE TRIBE, ET AL.,
Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONS FOR CERTIORARI

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Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONS FOR CERTIORARI

Pursuant to Rule 36 of the Rules of this Court and with the consent of all parties, Conoco Inc. and Tenneco Oil Company ("Producers") respectfully file this brief *amici curiae* in support

of the petitions for a writ of certiorari which seek review of the decision of the Tenth Circuit on rehearing *en banc* entered on January 23, 1986, (4-3), and supplemented on June 18, 1986.

INTEREST OF AMICI

The petitions raise three questions of great importance to Producers. First, the *en banc* decision by a divided Tenth Circuit below (4-3) imposes liability retroactively against innocent producer-lessees who had acted in reasonable reliance upon the conduct of the Secretary. *Amici* concur in petitioners' view that the common law trust principles relied upon by the Court in *United States* v. *Mitchell,* 463 U.S. 206, 226 (1983) ("Mitchell II") and *Nevada* v. *United States.* 463 U.S. 110, 145 (1983) ("Nevada") support that innocent third parties should not be held accountable for a trustee's breach of fiduciary obligations. [1]

Second, the majority decision on rehearing *en banc* below concludes that the District Court can set aside, as being arbitrary and capricious, the Secretary's long-standing determination as to the manner in which royalties should be computed for "wet" gas.[2] Under the Secretary's consistent and long-standing construction of standard lease terms and regulations, gas royalties were based upon the liquid products derived from the "wet" gas stream *only if* (i) the producer-lessee is the owner of the gas processing plant producing products from the wet gas stream, or

---

[1] We note that the District Court correctly found that any failure by the producer-lessees to account for and pay royalties resulted from "no apparent fault of their own". Jt. App. 127a, 479 F.Supp. at 549. See also the discussion in the *en banc* dissenting opinion of Judges Seth, McWilliams and Barrett. Jt. App. 12a, 782 F.2d at 861.

[2] "Wet" natural gas is of such Btu content that it includes hydrocarbon substances in sufficient quantities that when processed through a plant, liquid by-products result. Wet gas has not been defined by the Secretary. The United States Geological Conservation Manual, Part 647, Chapter 2 (1977) however, defined "dry" gas as gas which contained minor amounts of liquefiable hydrocarbons, i.e., gas of 1050 Btu's or less at 14.73 psia and 60°F.

(ii) the producer-lessee realizes direct income from the sale of the liquid products derived from the wet gas stream. We concur with the decision by the original panel of the Tenth Circuit in that regard. In such opinion, Chief Judge Seth concludes that the Secretary's long-standing construction of the lease and the regulations was proper, especially given the express grant of authority to the Secretary which is contained in the lease. Jt. App. 28a-29a, 728 F.2d at 1559.

Third, the *en banc* majority's opinion below conflicts with the decisions of this Court in the *Mitchell II* and *Nevada* cases, *supra*, and the provisions of the Indian Mineral Leasing Act, 25 U.S.C. §§ 396(a) - 396(g) (1982) prescribing how the Secretary's trust duties to Indians must be defined. The majority's decision below in essence obligates the Secretary to "maximize" the Tribes' revenues over the short-term by resolving every ambiguity in a regulation or lease form in favor of the affected Tribe. We believe, instead, as stated in the *en banc* dissenting opinion of Judges Seth, McWilliams and Barrett, that the Secretary has discretion in carrying out his duties to carry out national resource development and energy policies. Jt. App. 5a, 782 F.2d at 857.

The interest of *Amici* in these issues is clear. Both are defendants in certain companion litigation being brought by the Jicarilla Apache Tribe, respondent herein; such litigation being *Jicarilla Apache Tribe* v. *Conoco Inc., et al.*, Civ. No. 76-430 (D.N.M.) (Complaint filed July 28, 1976). Testimony in the trial of such case was completed on August 4, 1984; and the decision of the trial court is *sub judice*. Conoco Inc. is also a defendant in a lawsuit pending in the United States District Court for the District of Wyoming, entitled *Shoshone and Arapahoe Indian Tribes* v. *Donald P. Hodel, et al.*, Civ. No. C81-131K (D. Wyo.) (Complaint filed Jan. 19, 1981).

In each of these two related litigation matters, issues similar to those herein are involved concerning (i) the Secretary's long-

standing uniform and reasonable interpretation of the terms of Standard Lease Form 5-157 and the regulations implementing the Indian Mineral Leasing Act; and (ii) the imposition of liability upon innocent producer-lessees which had acted in reasonable reliance upon the conduct of the Secretary.

STATEMENT OF THE CASE

Except as supplemented below, *Amici* adopt and incorporate by reference the statement of the case as set forth in the petition of Unicon Producing Company in Case No. 86-226.

We emphasize, however, that the primary issue on rehearing *en banc* before the Tenth Circuit was whether the Secretary's long-standing and pre-litigation construction of the provisions of Standard Lease Form 5-157 and his regulations were correct with respect to the computation and payment of royalties for "wet" gas. Under the Secretary's pre-litigation construction, if the producer-lessee did not, in fact, process the gas or own an interest in the gas processing plant, or otherwise directly receive "proceeds" from the processing of the natural gas, gas royalties were not to be based upon the plant product values. There was no finding by the District Court that the Secretary had acted in an arbitrary or capricious manner in reaching and continuing his construction of the standard lease terms and regulations as to the royalties to be paid for the "wet" natural gas at issue.

We observe, also, that in large part, the issues actually tried in the bench trial before the District Court concerned the purported antitrust claims being asserted by the plaintiff, Jicarilla Apache Tribe ("Tribe"), against the defendant producer-lessees. Such antitrust claims were dismissed by the District Court, and both the majority and minority opinions below are in full agreement that the Tribe wholly failed to sustain such antitrust claims.

SUMMARY OF ARGUMENT

The importance of the issues in this case to the management of both public lands and Indian lands is evident from the sharply divided *en banc* decision (4-3) of the Tenth Circuit as to which review is sought. An early and definitive ruling by the Court as to standards of review which apply to actions by the Secretary of the Interior regarding natural gas royalties to the Indians under the standard form oil and gas leases at issue is of great importance, especially given the ongoing litigation in which similar issues are being raised.

The *en banc* majority's decision below is inconsistent with the Secretary's long-standing interpretation of terms contained in a standard lease form and the regulations implementing the Indian Mineral Leasing Act. In addition, the determination of the *en banc* majority to impose liability upon innocent third-party producer-lessees is in direct conflict with the common law trust principles referred to by this Court in *Mitchell II, supra,* and *Nevada, supra.*

ARGUMENT

I.

THE PLAINTIFF INDIAN TRIBE FAILED TO PROVE THAT THE SECRETARY'S CONDUCT WAS ARBITRARY AND CAPRICIOUS, CONSTITUTED AN ABUSE OF DISCRETION, OR AMOUNTED TO A BREACH OF TRUST.

With respect to the claims of the Tribe against the defendant producer-lessees, the underlying oil and gas leases are standard forms issued by the Federal Government. Jt. App. 61a-62a, 728 F.2d at 1574-1575. The pertinent provisions of such Standard Lease Form 5-157 provide as follows:

> [T]he Lessee hereby agrees . . .
>
> * * *

> — To pay . . . a royalty of 16⅔ percent of the value or amount of all oil, gas . . . and/or all other hydrocarbon substances produced and saved from the land leased herein . . . . During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. *The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value.* (emphasis added.)[3]

Under the terms of the applicable leases, therefore, the Secretary explicitly is authorized to use his discretion to accept the "actual amount realized by the Lessee from the sale of said products" (i.e., natural gas) as "conclusive evidence" of value for natural gas production for purposes of computation and payment of royalties.[4] No evidence was presented before the trial court which establishes that the Secretary either abused his discretion or acted in an arbitrary and capricious manner by having used the actual proceeds which accrued to the defendant producer-lessees under long-term gas sales contracts as constituting "value" for gas royalty computation and payment purposes.

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[3] We have underlined the word "all" to emphasize that nothing in the Standard Lease Form 5-157 authorizes the Secretary of the Interior, or his designees, to "value" the Government's proportionate share (i.e., the 16⅔ percentage share) at a value or amount different from that of the share of the producer-lessee.

[4] We note that decision by the majority of the original panel of the Tenth Circuit expressly discusses this issue. Jt. App. 28a-29a, 728 F.2d at 1559-60.

It must be presumed by this Court, furthermore, that the Secretary of the Interior, government accountants, and other public officials not only properly performed their duties, but also faithfully discharged those matters committed to their discretion under the applicable laws and regulations.[5] *First Nat'l Bank in Billings* v. *First Bank Stock Corp.*, 197 F. Supp. 417, 424-25 (D. Mont. 1961); Fed. R. Evid., Rule 301 (1982); 1 Jones on Evidence § 3:34 (1972); Annot., Presumption That Public Officers Have Properly Performed Their Duties, As Evidence, 141 A.L.R. 1037 (1942); and the *en banc* dissenting opinion of Judges Seth, McWilliams and Barrett at Jt. App. 5a, 782 F.2d 857.

It should be noted, moreover, that the Secretary filed a brief in the companion litigation styled *Jicarilla Apache Tribe* v. *Conoco Inc.*, No. 76-430 (D.N.M.) fully supporting the decision of the original panel of the Tenth Circuit. In such brief of the Government, it is stated that the Secretary's observance of long-standing administrative practice, and his failure to have immediately changed the royalty computation practices as to gas produced from the Jicarilla Reservation Lands was "neither arbitrary and capricious nor an abuse of discretion or a breach of trust . . . " (Federal Defendant's Supp. Brief dated April 2, 1984, at Page 3.)[6]

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[5] Under the United States Geological Survey ("USGS") Conservation Division Manual, Part 647, Chapter 2 (1977), it is specified that the area accountant "is responsible for . . . ensuring that royalties are timely and correctly billed . . . (and) ensuring that required audits and notifications are made." (reference added). Trial testimony contained in the Joint Appendix as filed with the Tenth Circuit confirms that the USGS Accountants involved properly performed their duties and followed the existing regulations and long-standing administrative construction of the lease provisions. (10th Cir. App. A-932 to 934).

[6] We note, parenthetically, that the Tribe also has filed an action for money damages against the Secretary of the Interior. Jt. App. 41a, n.3. That action has been stayed pending the outcome of this suit. Judges Seth, McWilliams, and Barrett expressly have dissented

The Secretary and the subagencies within the United States Department of the Interior prior to the commencement of this litigation, moreover, had followed a long-standing and consistent practice of having interpreted the word "value" under various government standard oil and gas lease forms to mean the actual proceeds accruing to lessees under long-term natural gas sales contracts. With regard to this long-standing administrative construction and policy of using actual proceeds accruing to the lessee under arms-length gas sales contracts as constituting "value", see: ABA Natural Resources Law Section — Task Force Report on Federal Oil and Gas Royalty Matters, 15 Nat. Resources Law., 757 at 762, 782 (1983) (referring to the long history within the United States Department of the Interior of having accepted the proceeds accruing to the lessee under gas sales contracts as being the proper measure for royalty value); Testimony of Jack Darrough, USGS, Supervisor Accountant, at p. A-933 of the Joint Appendix filed with the Tenth Circuit (referring to the past practice within the USGS of having computed royalties based on the "contract price or on prices allowed by F.P.C. . . . ."); USGS Conservation Division Manual, Part 647, Chapter 2, 647.2.1, Exh. No. 1, Historical Information (Release No. 35, Aug. 15, 1977) (stating that the USGS historically operated under a *policy* that "royalty was generally based on the price received by the Lessee under an arms-length contract . . . .").

Corporations such as the defendant producer-lessees are "persons", after all, for purposes of the constitutional guarantees of due process and just compensation. *Louis K. Liggett Co.* v. *Baldridge,* 278 U.S. 105, 111 (1928); *Jim Young Development Corp.* v. *State Highway Comm'n,* 56 F.R.D. 38, 41 (W.D. Mo.

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from the *en banc* majority's conclusion that the defendant producer-lessees should pay the additional royalties due if the nonpayment resulted from the Government's breach of its fiduciary duty. Jt. App. 5a, 782 F.2d at 857.

1971). The Fifth Amendment protects the property of corporations against confiscation equally with that of individuals. *County of San Mateo* v. *Southern Pacific R.R. Co.*, 13 Fed. 145 (C.C. Cal. 1882). Corporations are possessed of the same guarantees of constitutional property rights as natural persons. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). The protections from arbitrary power and arbitrary legislation are basic among the constitutional protections afforded by the due process requirement. *Heiner* v. *Donnan*, 285 U.S. 312 (1932). A leasehold interest is a property right which may not be appropriated by governmental action without just compensation. *Sun Oil Co.* v. *United States*, 572 F.2d 786, 818 (Ct. Cl. 1978). Government regulations can become so onerous as to constitute a taking which requires just compensation. *Goldblatt* v. *Town of Hempstead*, N.Y., 369 U.S. 590 (1962).

A sudden change by the Secretary or government subagencies in the procedures for fixing value of natural gas production and its derivative products for royalty purposes would constitute a violation of due process. *King* v. *Finch*, 428 F.2d 709, 713 (5th Cir. 1970). *Baltimore & Annapolis R.R. Co.* v. *Washington Metro. Area Transit*, 642 F.2d 1365, 1370 (D.C. Cir. 1980). In the instant situation, moreover, the long-standing administrative practice and findings by the Secretary as to royalty valuation are a rule of property; and to change such procedures "retroactively" would be arbitrary, capricious, and violative of due process guarantees. *Amoco Production Co.* v. *Andrus*, 527 F. Supp. 790 (E.D. La. 1981); *Marathon Oil Co.* v. *Andrus*, 452 F. Supp. 548 (D. Wyo. 1978); *cf.*, *Utah International Inc.* v. *Andrus*, 488 F. Supp. 976 (D. Colo. 1980).

In short, under the circumstances neither the Minerals Management Service nor the Secretary lawfully could retroactively change the methods used for fixing and determining the value of gas or gas products for royalty computation and payment purposes. *Continental Oil Co.* v. *United States*, 184 F.2d 802, 821

(9th Cir. 1950) (holding that the Secretary may neither retroactively recompute royalties nor make retroactive an order which changes the method to be used for fixing the value of natural gas and its derivative products for royalty purposes). Accordingly, the majority opinion by the original panel of this Court is legally correct in its holding that the pre-litigation administrative interpretation and construction of the leases and regulations concerning computation of gas royalties by the Secretary "must be applied to and through the conclusion of these proceedings." Jt. App. 29a, 728 F.2d at 1560.

II.

THE DECISION OF THE MAJORITY BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT WHICH HOLD THE SECRETARY AS TRUSTEE, AND NOT INNOCENT THIRD PARTIES, LIABLE FOR ALLEGED BREACHES OF TRUST.

After the subject oil and gas leases were entered into, the Secretary issued monthly "Statements of Account" (USGS Form 9-1424) to the defendant producer-lessees (App. A-934, A-101).[7] These monthly statements of account as issued by the

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[7] 30 C.F.R. § 221.40 (1975) states in part: "[T]he lessee shall tender all payments of . . . royalty . . . in accordance with the statements rendered by the Supervisor pursuant to § 221.12 . . . ."

30 C.F.R. 221.12 (1975) states in part: "The Supervisor shall render monthly to the lessee . . . statements showing the amount of . . . gas produced or sold and the . . . *value* of production accruing to the lessor as royalty. (emphasis added)

See also with regard to payment of royalties by lessees in conformity with billings and determinations made by the Secretary of the Interior: USGS Conservation Division Manual Part 647, Chapters 2 and 15; Notice to Lessees and Operators of Indian Oil and Gas Leases (NTL-1A), 42 Fed. Reg. 4546 (Jan. 25, 1977); Notice to Lessees and Operators of Federal and Indian Onshore Oil and Gas Leases (NTL-5), 42 Fed. Reg. 22610 (Mar. 4, 1977); Testimony of Jack Darrough, USGS Accountant at App. A-932 to A-934 of the Joint Appendix as filed with the Tenth Circuit in this

Secretary set forth, among other things, the "value" of the natural gas production identified therein for royalty computation and payment purposes. The defendant lessees relied upon the issuance to them of these "statements of account" by the Secretary as constituting a confirmation of the value and determination of the royalties applicable to the natural gas production being referred to in such statements.

An examination of the "pre-litigation" statement of account forms (USGS Form 9-1424) which were sent to the Lessees of Indian oil and gas leases by the Secretary confirms that such were "account statements" or "billings" in every sense. For example, such statement of account forms directed Lessees to "remit by check, draft, or money order" any amount shown to be due. The third column is "lease value", and the last column is "charges and payments." Like any ordinary billing, these statements concluded: "The last item is your balance." The rendition of these monthly statements or billings by the USGS to the defendant lessees, we submit, constituted an official act by the Secretary. 30 C.F.R. §§ 221.12, 221.40 (1975); 25 C.F.R. § 171.13 (1975); Jt. App. 68a.

In issuing these account statements, the Secretary, or his representatives, computed "value" and the resulting royalties based upon the prices received by the producer-lessee under the applicable gas sales contract or the prices allowed by the Federal Power Commission, or its successor, the Federal Energy Regulatory Commission. (See page A-933 of the Joint Appendix as filed with the Tenth Circuit.)

It was not until after the Jicarilla Apache Tribe commenced this litigation in 1975, in fact, that the Secretary added a *new* legend at the bottom of the monthly statement of account form

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case; Memorandum Opinion filed September 7, 1978 (Mechem, J.) in this case, Jt. App. 68a-69a.

issued to lessees.[8] The new legend added by the Secretary was to the effect that the information being provided to the lessees in the statement of account form was "subject to correction". Such post-litigation addition of this cautionary legend, we submit, was nothing more than a self-serving maneuver by the Secretary, done at the urging and insistence of the Tribe. This conduct by the Secretary only serves to emphasize the prejudicial effect upon the claims being asserted against the defendant producer-lessees which results from the Government-Lessor having regularly issued the statements of account.[9]

The majority decision below appears to clearly impose liabilities upon producer-lessees who acted in reasonable reliance upon the Secretary's administration of oil and gas leases, including the Secretary's issuance of valuation determination as represented in the monthly statements of account given to such lessees. This holding conflicts with the statements of this Court in *Mitchell II, supra,* wherein this Court stated:

> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. *See* Restatement (Second) of Trusts §§ 205-212 (1959); G. Bogert, Law of Trusts and Trustees § 862 (2d ed. 1965); 3 A. Scott, Law of Trusts § 205 (3d ed. 1967). 463 U.S. at 226-27.

The majority *en banc* opinion below, moreover, imposed liability upon the innocent producer-lessees despite the fact that the District Court had expressly concluded that any failure to account

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[8] A photostatic copy of a USGS Form 9-1424 (rev. 12-68) as rendered in 1972 by the United States Department of Interior, Geological Survey to lessees under Indian oil and gas leases is contained in the Annex to this brief at p. 1a, *infra.*

[9] We note, parenthetically, that "dual accounting" also came about only after the litigation had been commenced. See the discussion by Judges Seth, McWilliams, and Barrett in the dissenting *en banc* opinion. Jt. App. 13a, 782 F.2d at 861.

and pay for royalties resulted from "no apparent fault" of the producer-lessees. Jt. App. 127a, 479 F. Supp. 549.[10]

The common law principles referred to by this Court in both *Mitchell II, supra,* and *Nevada, supra,* support the proposition that innocent third party producer-lessees should not be held accountable for a trustee's alleged breaches of fiduciary obligations. *See,* Restatement (Second) of Trusts § 326 (1959) (third parties liable to a beneficiary only if they have notice of a breach and participate in it); see, also, A. Scott, the Law of Trusts §§ 321, 326, 326.1, 326.6 (2d ed. 1956); *International State Bank* v. *Bray,* 87 N.M. 350, 352, 533 P.2d 583, 585 (1975); *Voss Oil Co.* v. *Voss,* 367 P.2d 977, 980 (Wyo. 1962).

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[10] See also the discussion in the memorandum opinion of the District Court filed September 7, 1978. Jt. App. 68a-69a.

CONCLUSION

As is evidenced by the sharply divided decision of the Tenth Circuit below (4–3), this case raises important questions concerning the administration of Indian lands. Because the majority decision below conflicts with the principles announced by the Court in *Mitchell II, supra,* and *Nevada, supra,* the terms of the lease agreements at issue, and settled principles of trust law, certiorari should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Amici Curiae In Support of Petitions For Certiorari to be mailed, by placing same in the United States mail, postage prepaid, to the following counsel of record on the 25th day of August, 1986.

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Original Signed By
ERNEST J. ALTGELT

ERNEST J. ALTGELT, III

ANNEX

ANNEX

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

STATEMENT OF ACCOUNT

ISSUING OFFICE: 1
REGIONAL SUPERVISOR
CONSERVATION DIVISION
2002 FEDERAL BUILDING
P. O. BOX 2859
CASPER, WYOMING 82601

ACCOUNT NO. 35 14-20-258-001348 WYOMING
IND TRIBAL LAND FIELD 713

1

CONTINENTAL OIL CO
DRAWER 1267
PONCA CITY, OK 74601

185

2

JOINT BUSINESS COUNCIL
FT WASHAKIE, WY

4:

REMIT BY CHECK DRAFT OR MONEY ORDER | NO RECEIPT WILL BE ISSUED

STATEMENT FOR MONTH ENDING 12/31/71

BALANCE FROM THE PREVIOUS STATEMENT - 0 - 45.00

EXPLANATION	LEASE QUANTITY.	LEASE VALUE ROYALTY QUANTITY	UNAPPLIED RENTAL	CHARGES AND PAYMENTS
GAS ADJ977 512 07/70	140,172.00	21,780.77		3,630.13
GAS ADJ977 512 07/70	140,172.00CR	21,750.39CR		3,625.07
GAS ADJ977 512 08/70	155,770.00	24,204.48		4,034.08
GAS ADJ977 512 08/70	155,770.00CR	24,003.80CR		4,000.63
GAS 977 840 11/71	267,714.00	45,423.84		7,570.64
OIL 977 963 12/71	2,664.47	8,473.03		1,412.17
GAS 977 963 12/71	270,501.00	45,195.15		7,532.53
PAID 11/71 GAS 185 X342 08 01/06/72				38.51
PAID 11/71 GAS 185 X342 08 01/06/72				7,570.66
PAID 11/71 GAS 185 X361 08 01/31/72				7,532.66
		BALANCE	- 0 -	1,457.02

MAKE REMITTANCE PAYABLE TO "UNITED STATES GEOLOGICAL SURVEY" AND FORWARD TO ISSUING OFFICE ADDRESS SHOWN ABOVE. SEPARATE PAYMENTS REQUIRED ON 3 AND MORE PURCHASES - SHALL BE MADE IN ACCORDANCE WITH SPECIFIC INSTRUCTIONS FROM ISSUING OFFICE

LAST ITEM IS YOUR BALANCE

BEST AVAILABLE COPY